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No.

IN THE

Supreme Court of the United States

October Term, 1984

ANTHONY F. GIGLIO,

Petitioner,

v.

JOHN P. DUNN, Individually and as Superintendent of Schools of Mt. Morris Central School District, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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EILEEN M. KELLEY (Counsel of Record)
HINMAN, STRAUB, PIGORS & MANNING, P.C.
WILLIAM F. SHEEHAN, of Counsel
90 State Street
Albany, NY 12207
(518) 436-0751

Counsel for Petitioner

Dated: August 27, 1984

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Questions Presented.

(1) Whether a tenured public employee has a constitutional right to a pre-deprivation hearing prior to the termination of employment, regardless of available post-deprivation remedies.

(2) Whether a pre-deprivation hearing can be found to be impractical because of the intentional failure of the state actor to follow prescribed procedure over which the state actor has final authority.

(3) Whether a state actor with final authority over a matter who contravenes the requirements of state law can be found to be acting pursuant to established state procedure.

(4) Whether the requisites of due process are satisfied by a post-deprivation hearing in the form of an alternate, parallel state remedy when the due process claim arises from the intentional circumvention of state law by a person acting under color of state law who is vested with state authority.

Parties.

In addition to John P. Dunn, whose name appears in the caption, respondents include those listed below:

Charles Hollowach, individually and as Superintendent of Mt. Morris Central School District;

Robert Bishop, individually and as trustee;

Glenn Dalrymple, individually and as trustee;

Ronald Hallinen, individually and as trustee;

Michael MacArthur, individually and as trustee;

Ann Crowley, individually and as trustee;

Beatrice Palermo, individually and as trustee; and

Mt. Morris Central School District.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984.

ANTHONY F. GIGLIO,

Petitioner,

v.

JOHN P. DUNN, Individually, and as Superintendent of Schools of Mt. Morris Central School District, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Opinions Below.

The April 20, 1984 opinion of the Court of Appeals is reported at 732 F.2d 1133 and is appended hereto as Appendix "A".

The May 31, 1984 order of the Court of Appeals denying the petition for rehearing is appended hereto as Appendix "B".

The unreported opinion of the District Court dated September 15, 1983 is appended hereto as Appendix "C".

Jurisdiction.

The Court of Appeals entered judgment on April 20, 1984 and denied Petitioner's application for rehearing on May 31, 1984. Jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

Constitutional Provisions, Acts and Statutes.

United States Constitution, Fourteenth Amendment; 42 U.S.C. §1983; N. Y. Educ. Law (McKinney) §2509(1)(b), (2); N. Y. Educ. Law (McKinney) §2510; and N. Y. Educ. Law (McKinney) §3020-a. These are set out seriatim in Appendix "D".

Statement of the Case.

Petitioner brought this action pursuant to 42 U.S.C. §1983 challenging the deprivation of his property without due process of law. The essence of Petitioner's complaint was that he was forced from his tenured position by the Respondents, and was thus deprived of a fundamental property right without first having received notice and a hearing. Jurisdiction in the district court was based upon 28 U.S.C. §1343.

Petitioner was employed as a tenured school principal by Respondent School District. Beginning in April 1981, the Respondent Superintendent intentionally harassed Petitioner in order to cause him to suffer nervous and mental problems. As a result of the harassment, on December 30, 1981, Petitioner was forced to go on full-time disability leave.

On June 28, 1982, two of the Respondents, John Dunn and Charles Hallowach, acting at the direction of the remaining Respondents, informed Petitioner that if he did not return to work immediately, his position would be abolished. At the time of this meeting, Petitioner was in poor mental condition and was under intensive medical care and psychiatric treatment, which included medication. When the Petitioner told the Respondents that he could not immediately return to work due to his mental problems, the Respondents told Petitioner that if he did not resign his position that day, his position would be abolished. As a direct result of Respondents' threats and their undue pressure and coercion, Petitioner tendered his letter of resignation which had been prepared by Respondents. The Respondents never planned to abolish Petitioner's position on June 28, 1982, and did not actually do so until September 8, 1982, when a new position was created. The new position created by the Respondents had substantially similar duties and responsibilities as Petitioner's previous position.

Under the applicable New York law, N.Y. Educ. Law (McKinney) §2509, Petitioner was a tenured employee and could not be terminated except for cause. A hearing procedure to determine whether cause existed for termination is also statutorily created, N.Y. Educ. Law (McKinney) §3020-a. Further, N.Y. Educ. Law (McKinney) §2510 provides that if a tenured employee's position is abolished and a new position is created with duties similar to the abolished position, the tenured employee is entitled to appointment in the new position. It is Petitioner's contention that Respondents' noncompliance with these sections of state law and their intentional acts of pressuring, harassing and coercing him into terminating his employment violated his constitutional right to due process of law.

Upon Respondents' motion pursuant to Fed. R. Civ. P. 12(b)(6), the District Court for the Western District of New York dismissed the complaint for failure to state a claim upon which relief can be granted. The district court, relying upon *Parratt v. Taylor,* 451 U.S. 527 (1981), held that it would have been impractical to give Petitioner a pre-deprivation hearing and that the state provided a post-deprivation remedy which satisfied due process; therefore, the complaint failed to state a due process claim. The Court of Appeals for the Second Circuit affirmed the decision of the district court. Petitioner's motion for a rehearing and a rehearing *en banc* was denied.

Reasons for Granting the Writ.

I. In determining the nature and scope of Petitioner's rights, the Court of Appeals' decision in this case misapplied and misconstrued decisions of this Court involving important and recurring constitutional issues.

It is well-settled by decisions of this Court that in order to state a claim under 42 U.S.C. §1983, the complaint must contain two allegations: 1) that the conduct complained of was committed by a person acting under color of state law; and 2) that this conduct deprived the person of rights, privileges and immunities secured by the Constitution or laws of the United States. *Parratt v. Taylor,* 451 U.S. 527, 535 (1981); *Gomez v. Toledo,* 446 U.S. 635 (1980). Equally well-settled by this Court is the principle that in reviewing a dismissal on the pleadings, the material facts alleged in the Complaint must be taken as true. *Hospital Building Co. v. Rex Hospital Trustees,* 425 U.S. 738, 740 (1976).

In the case at hand, the Court of Appeals, affirming the decision of the District Court, held that the second re-

quirement of a §1983 action had not been satisfied by the allegations in the Complaint regarding the deprivation of Petitioner's right to due process of law. In so holding, the Court of Appeals found that it would have been impractical to provide Petitioner with a pre-termination hearing and that the requisites of due process were satisfied by post-deprivation State remedies available to Petitioner. In applying *Parratt* and ignored the holding of this Court interpreting *Parratt* in such a manner to the allegations in Petitioner's complaint, the Court of Appeals misconstrued *Parratt* in *Logan v. Zimmerman Brush Co.*, 45 U.S. 422 (1982). That the Court of Appeals misconstrued *Parratt* has been further highlighted by the extension of the *Parratt* holding in the case of *Palmer v. Hudson,* 52 U.S.L.W. 5052 (U.S., July 3, 1984), decided after the Court of Appeals decision in this case.

The proper application of the *Parratt* decision, even as extended by *Palmer,* should not result in dismissal on the pleadings in the case at hand. *See Giglio v. Dunn,* 732 F.2d at 1137 (Cardamone, J., dissenting). It is now settled law under these cases that a random, unauthorized deprivation of property, either by negligent or intentional acts of a state employee, does not constitute a violation of the requirements of the due process clause of the Fourteenth Amendment if a meaningful post-deprivation remedy for the loss is available. *Parratt v. Taylor,* 451 U.S. at 541-542; *Palmer v. Hudson,* 52 U.S.L.W. at 5056. However, it is also well-settled that post-deprivation remedies do not satisfy due process where the deprivation of property is caused by conduct pursuant to established state procedure, rather than random and unauthorized action. *Logan v. Zimmerman Brush Co.*, 455 U.S. at 435-36. This Court specifically stated that *"Parratt . . .* was dealing with a . . . 'random and unathorized act' by a state

employee . . ." and was "not designed to reach . . . a situation" where the deprivation is the result of an established state procedure. 455 U.S. at 435-436.

In its decision, the Court of Appeals made improper findings of fact on the motion to dismiss. It then misapplied the decision in *Parratt* to those facts and held that a pre-deprivation hearing was impractical. The acts of the Defendants, as alleged in the complaint and which must be taken as true, were not random and unauthorized. The purpose and the result of the Respondents' intentional acts were certainly predictable to the Respondents who were the only state actors empowered to offer Petitioner a pre-termination hearing. As alleged in the Complaint, the intent of the Respondents was to procure Petitioner's resignation by pressure and coercion, such conduct being tantamount to a termination of his employment. The holding of the Court of Appeals, that in such a situation a pre-termination hearing is impractical, permits state actors such as Respondents "effectively to avoid due process requirements by intentionally coercing tenured employees into resigning, rather than by firing them outright." *Giglio v. Dunn,* 732 F.2d at 1137 (Cardamone, J., dissenting).

The Court of Appeals also misconstrued *Parratt* by its failure to find that the Respondents' conduct constituted established state procedure and additionally, clearly failed to apply the decision of this Court in the *Logan* case. The Respondents, pursuant to the applicable state law, are clothed with the final authority over all matters pertinent to Petitioner's employment; therefore, they were the sole state actors who were in a position to provide Petitioner with pre-deprivation due process. *See Palmer v. Hudson,* 52 U.S.L.W. at 5056 ("[T]he controlling inquiry is solely

whether the state is in a position to provide for pre-deprivation process.") The decision to circumvent the requirements of state law made by the only officials in charge of instituting a hearing pursuant to state law constituted established state procedure which destroyed Petitioner's property right. By terminating Petitioner in such a manner, the Respondents failed to comply with statutorily mandated procedure which they alone, without the assistance of any other state actors, could afford Petitioner.

The Court of Appeals also incorrectly applied and misconstrued decisions of this Court when it held that the state provided an adequate post-deprivation proceeding which satisfied due process. An individual deprived of property must be given "an opportunity for a hearing before he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie v. Connecticut,* 401 U.S. 371, 379 (1971). It is clear that "the State may not finally destroy a property interest without first giving the [individual] an opportunity to present his claim of entitlement." *Logan v. Zimmerman Brush Co.,* 455 U.S. at 434. To determine the timing and nature of the hearing that is required in a particular situation, Courts must balance "the importance of the private interest and the length or finality of the deprivation (citations omitted); the likelihood of governmental error (citation omitted); and the magnitude of the governmental interest involved." *Logan v. Zimmerman Brush Co.,* 455 U.S. at 434; *Mathews v. Eldridge,* 424 U.S. 319, 335 (1976).

The *Logan* factors regarding the timing and nature of the required hearing were ignored by the Court of Appeals

when it determined that a post-deprivation hearing satisfied due process. The post-deprivation hearing found to be sufficient by the Court of Appeals, that is, a summary proceeding for challenging or reviewing administrative or other type of governmental action in New York State, does not come close to affording Petitioner the safeguards of a pre-deprivation hearing. In order to provide Petitioner with a meaningful opportunity to be heard, a pre-termination hearing was necessary considering the importance of Petitioner's interest in his continuing employment and the fact that Petitioner's termination by coercion constituted a discharge from his employment. *See, e.g., Dabney v. Freeman,* 358 F.2d 533, 535 (D.C. Cir. 1965) (a separation from Federal service by means of a coerced resignation is, in substance, a discharge); *Paroczay v. Hodges,* 219 F.Supp. 89, 94 (D.D.C. 1963) (involuntary resignation from govenment employment constitutes a discharge where employee is forced to make immediate choice between resigning and facing charges). The substantial interest of Respondents would not have been compromised in any manner by affording Petitioner a pre-termination hearing, rather than obtaining his termination through coercive tactics.

It is clear from the above stated discussion that the Courts below decided important, as well as controversial, questions of law in this action. The Courts below misconstrued decisions of this Court and misapplied the principles derived from these decisions to improper findings of fact. For these reasons, this case should be heard.

II. This case should be heard as there exists a conflict between the Circuit Courts of Appeals.

Other Circuit Courts have considered the issue of whether a public employee is deprived of due process of

law when terminated from employment without receiving a pre-termination hearing. Most recently, the Third Circuit decided the case of *Cohen v. City of Philadelphia,* 736 F.2d 81 (3rd Cir. 1984) which held that plaintiff's due process rights were not violated by the defendants' failure to comply with the municipal procedure providing for a pre-deprivation hearing prior to his termination since adequate post-deprivation remedies existed.

In stark contrast to the above cited case, is the present case, as well as cases from other Circuit Courts of Appeals. In *Loudermill v. Cleveland Board of Education,* 721 F.2d 550 (6th Cir. 1983) *cert. granted,* 52 U.S.L.W. 3844 (U.S., May 21, 1984) (Nos. 83-1362, 83-6392), the Court held that a dismissed public employee was entitled to pre-termination process because it was feasible and practical to provide such process, regardless of available post-deprivation remedies. The Court found that the compelling private interest in retained government employment outweighed the administrative burden of the pre-termination process. *See Logan v. Zimmerman Brush Co.,* 455 U.S. at 434. Such pre-termination process was essential in order to protect the important property right of the employee. The case of *Vail v. Board of Education,* 706 F.2d 1435 (7th Cir. 1983) *aff'd by equally divided court,* 52 U.S.L.W. 4483 (U.S., April 23, 1984), also held that an employee of a school district was deprived of his right to due process by defendants' failure to afford him a hearing before voting to terminate his employment contract. *See also, Vanelli v. Reynolds School District No. 7,* 667 F.2d 773, 778 (9th Cir. 1982) ("[t]here is a strong presumption that a public employee is entitled to some form of notice and opportunity to be heard before being deprived of a property or liberty interest" (Citations omitted)).

From these cases, it is obvious that a conflict exists among several of the Circuits as to the extent of due process protection that must be afforded an employee upon termination of public employment. Due to the existence of this conflict involving an important and recurring issue, review of the present decision, as well as the decision in the *Loudermill* case, is needed.

III. The issues in this case are similar to those in a case now pending before this Court, and the case at bar should be heard as well.

This court has granted Certiorari in *Loudermill v. Cleveland Board of Educ.*, 721 F.2d 550 (6th Cir. 1983) *cert. granted,* 52 U.S.L.W. 3844 (U.S., May 24, 1984) which presents the question of whether a public employee's due process rights are violated upon dismissal without a pre-termination hearing. The present petition should be granted as well inasmuch as similar issues are before the court for review.

IV. This case should be heard as there is an intracircuit conflict.

The Court of Appeals decision in this case failed to address whether the conduct of the Respondents could have been pursuant to an established state procedure. If Respondents' conduct was pursuant to established state procedure, then available post-deprivation remedies would not be sufficient to satisfy due process and a pre-deprivation hearing would have been required. *See Logan v. Zimmerman Brush Co.*, 455 U.S. at 435-36.

In failing to address whether Respondents acted pursuant to established state procedure, the Court of Appeals

ignored a case it recently decided which defined the type conduct which constitutes established state procedure. In *Burtnieks v. City of New York,* 716 F.2d 982, 988 (2d Cir. 1983), the Court stated that "decisions made by officials with final authority over significant matters, which contravene the requirements of a written municipal code, can constitute established state procedure." In the present case, the Respondents had the final authority pursuant to state law over all matters regarding Petitioner's employment. Petitioner's employment was terminated directly by the Respondents' decision to contravene the procedure for terminating employees provided by state law. It is clear that the Court of Appeals' failure to address the applicability of the *Burtnieks* case to the present case or to distinguish it in any manner will inevitably result in inconsistent future Court decisions in all cases containing allegations of due process violations because of the intracircuit conflict as to what conduct constitutes established state procedure.

The intracircuit conflict caused by the Court of Appeals' failure to address the *Burtnieks* case is of even greater significance due to this Court's recent decision in the *Palmer* case. Because *Palmer* extends the holding of *Parratt* to all unauthorized intentional deprivations, the definition of what conduct constitutes established state procedure is of great importance. Since this issue is an important and recurring one in the Second Circuit, as well as in all Circuits, the Second Circuit's intracircuit conflict in regard to it should be settled by this Court.

V. This case is important because it affects the constitutional rights of all tenured employees as it allows employers to avoid due process requirements.

It is well-settled that the Petitioner has a valid and protectable property interest in his tenured employment.

Perry v. Sindermann, 408 U.S. 593, 601 (1972). In order to protect this important property interest, Petitioner filed this action pursuant to §1983. The holding of the Court of Appeals that Petitioner failed to state a claim based upon the deprivation of this interest is unarguably of great personal interest to the Petitioner. However, the holding of the Court of Appeals has far-reaching effects beyond Petitioner's personal interest. For this reason, this Court should hear and decide the case.

The holding of the Court of Appeals, which interprets and applies decisions of this Court, adversely affects the due process rights of all tenured employees. The decision allows state actors, such as the Respondents who are empowered to afford pre-deprivation process to persons in similar positions to Petitioner, "to avoid due process requirements merely by intentionally coercing tenured employees into resigning, rather than by firing them outright." *Giglio v. Dunn*, 732 F.2d at 1137 (Cardamone, J., dissenting). To dismiss this case on the pleadings on the basis of *Parratt* has the effect of condoning the intentional, coercive acts of state actors which ultimately destroy important property interests. The type of intentionally wrongful conduct condoned by the Court of Appeals in this decision is the type of official misconduct which §1983 was specifically designed to deter. *Monroe v. Pape*, 365 U.S. 167 (1961). Due the mere existence of a summary proceeding to challenge governmental action in New York State, no constitutional protection will be afforded tenured employees who are the potential victims of coercion and undue pressure from their employers.

The holding of the Court of Appeals, that New York's summary proceeding challenging governmental action was sufficient to satisfy the requisites of due process, also has

important ramifications beyond the facts of the instant case. Such a holding denies tenured employees a meaningful opportunity to be heard. By relegating an employee to a post-termination State proceeding, the employee is denied a federal forum to protect an important and valuable property interest. Access to the federal forum is denied even when the complaint clearly alleges more than a state law claim. Instead, the decision of the Court of Appeals overlooks the constitutional violation due to the Court's eagerness to avoid "a constitutional thicket", *see Giglio v. Dunn,* 732 F.2d at 1134, and the result is the failure to afford constitutional protection to individuals against the actions of state actors who deliberately ignore mandated law in order to reach their desired improper result.

The federal claim alleged by persons similarly situated to Petitioner no longer has a corresponding federal remedy as the result of the Court's holding in this case. Since all tenured employees are potentially prey to state actors in positions such as Respondents, the number of persons denied a federal remedy is substantial. These persons are now relegated to an alternate state remedy to redress their state law claims. The lack of access to federal court to remedy a federal claim is certainly a significant limitation on the due process rights of all such persons who have been wronged by persons acting under color of state law. Therefore, because the decision of the Court of Appeals has such a far-reaching affect on the due process rights of many individuals, this Court should review it.

Conclusion.

In recent years, this Court has decided landmark decisions involving the constitutional right to due process of law. *See Parratt v. Taylor,* 451 U.S. 527; *Logan v. Zimmerman Brush Co.,* 455 U.S. 422; *Palmer v. Hudson,* 52 U.S.L.W. 5052. In applying certain of these decisions, while ignoring others, the Court of Appeals incorrectly assessed the validity of Petitioner's due process claim. In order to maintain uniformity and consistency in regard to the decisions of this Court in this area of law, as well as to have an opportunity to more clearly define due process rights, this case should be heard. Additionally, this case should be heard because it is of great importance as it affects the rights of a vast number of persons.

Respectfully submitted,

EILEEN M. KELLEY, (Counsel of Record)
HINMAN, STRAUB, PIGORS &
MANNING, P.C.
WILLIAM F. SHEEHAN, of Counsel
90 State Street
Albany, NY 12207
(518) 436-0751
Counsel for Petitioner

Appendix A

Decision of the United States Court of Appeals decided April 20, 1984

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Cal. No. 708—August Term 1983

(Argued January 30, 1984 Decided April 20, 1984)

Docket No. 83-7871

ANTHONY F. GIGLIO,

Plaintiff-Appellant,

—v.—

JOHN P. DUNN, Individually and as Superintendent of Schools of Mt. Morris Central School District, CHARLES HOLLOWACH, Individually and as Superintendent of Mt. Morris Central School District, ROBERT BISHOP, Individually and as Trustee, GLENN DALRYMPLE, Individually and as Trustee, RONALD HALLINEN, Individually and as Trustee, MICHAEL MACARTHUR, Individually and as Trustee, ANN CROWLEY, Individually and as Trustee, BEATRICE PALERMO, Individually and as Trustee, and MT. MORRIS CENTRAL SCHOOL DISTRICT,

Defendants-Appellees.

Before:

VAN GRAAFEILAND and CARDAMONE, *Circuit Judges*, and BONSAL,* *District Judge*.

Appeal from an order and judgment of the United States District Court for the Western District of New York (Telesca, J.) dismissing plaintiff's complaint for failure to state a claim on which relief can be granted, Fed. R. Civ. P. 12(b)(6).

Affirmed.

EILEEN M. KELLEY, Albany, N.Y. (Hinman, Straub, Pigors & Manning, P.C. and Donald T. Kinsella, Albany, N.Y., of Counsel), *for Plaintiff-Appellant*.

JAMES A. SPITZ, JR., Rochester, N.Y. (Harris, Beach, Wilcox, Rubin & Levey and Angela J. Panzarella, Rochester, N.Y., of Counsel), *for Defendants-Appellees*.

VAN GRAAFEILAND, *Circuit Judge*:

On June 28, 1982, appellant, Anthony Giglio, resigned from his position as a tenured high school principal in the

* Of the United States District Court for the Southern District of New York, sitting by designation.

Mount Morris Central School District. In this action brought in the United States District Court for the Western District of New York, Giglio contends that his resignation was coerced and that he was denied due process because a hearing did not precede the coercion. Judge Telesca dismissed Giglio's complaint for failure to state a claim, holding that a pre-coercion hearing would have been "not only impractical but virtually impossible" and that appellant's post-deprivation remedy under Article 78 of N.Y. Civ. Prac. Law was adequate to satisfy the requisites of due process. We affirm.

According to the allegations of Giglio's complaint which must be accepted here as true, *Fine v. City of New York*, 529 F.2d 70, 75 (2d Cir. 1975), appellee Dunn, the District Superintendent, began to harass Giglio in 1981 with the intent of pressuring him into a nervous breakdown. By November 1981, Giglio's mental problems had become sufficiently severe that he began to work only part time. After December 30, 1981, he went on full-time disability leave.

On June 28, 1982, appellees, Hollowach, Superintendent of the Board of Cooperative Educational Services for the District, and Dunn, met with Giglio. The two men, acting at the direction of the other individual appellees, told Giglio that the Board of Education would abolish his position at a meeting that evening unless Giglio agreed to return to work by July 1, 1982. When Giglio told Dunn and Hollowach that his psychiatric problems prevented him from doing so, they told him that his position would be abolished at the Board meeting unless he agreed to resign. Giglio tendered his resignation a few hours later. On July 12, 1982, Giglio requested that his resignation be withdrawn, but, the resignation having been accepted and acted upon, his request was denied.

See Zarada v. Board of Educ., 42 Misc.2d 509, 510 (1963).

Assuming, as appellant alleges, that his resignation was coerced, Article 78 of N.Y. Civ. Prac. Law, which is an amalgam of the common law writs of certiorari to review, mandamus, and prohibition, made available to Giglio both a hearing and a means of redress. *See Willis v. Von Holden*, 67 A.D.2d 810 (1979). Had an Article 78 hearing been held, the court, with all the facts before it, could have determined whether appellant's resignation was coerced and, avoiding the constitutional thicket, could have ordered such reinstatement and monetary relief as was appropriate. *See id.* For reasons best known to his attorney, appellant abjured this readily available remedy, preferring to base his claim on an alleged due process right to a pre-coercion hearing. We agree with the district court that, in a case such as this, a pre-coercion hearing was neither feasible nor constitutionally required.

Although a resignation ostensibly voluntary may not be such at all, it nonetheless differs from an ordinary firing in two ways. First, it is not a unilateral act on the part of the employer, and, second, it does not purport to be for cause. Instead, it is a much-used, face-saving device designed to avoid the stigma of being fired. *See Abramovich v. Board of Educ.*, 46 N.Y.2d 450, 455, *cert. denied*, 444 U.S. 845 (1979); Irish, *If Things Don't Improve Soon, I May Ask You To Fire Me* 9 (Anchor Press/Doubleday 1975). A school teacher, for example, may resign and avoid the filing of written charges against him with the clerk or secretary of the school district. *See* N.Y. Educ. Law § 3020-a.

A coerced resignation does not involve a showing of cause; it is simply the submission by an employee to pressure exerted by a superior. For this reason, it is hard

to visualize what sort of prior hearing the Constitution would require the employer to conduct. If there is no factual dispute between the employer and the employee, a hearing is meaningless. *See Codd v. Velger*, 429 U.S. 624, 627 (1977)(per curiam). When an employee resigns, the only possible dispute is whether the resignation was voluntary or involuntary, and this cannot be determined in advance.

Due process requires only that a hearing be held at a meaningful time and in a meaningful manner. *Parratt v. Taylor*, 451 U.S. 527, 540 (1981). Where a pre-deprivation hearing is impractical and a post-deprivation hearing is meaningful, the State satisfies its constitutional obligations by providing the latter. *Id.* at 541-42; *see Engblom v. Carey*, 677 F.2d 957, 964-66 (2d Cir. 1982).

A tenured teacher always has the option of resigning. *Abramovich v. Board of Educ.*, *supra*, 46 N.Y.2d at 455. It follows that a school board has the option of accepting the resignation. Neither the New York Education Law nor the Constitution which looks to that Law, *see Goetz v. Windsor Central School Dist*, 698 F.2d 606, 608 (2d Cir. 1983), insists that the Board first must conduct a hearing. Where, as here, Article 78 gave the employee a meaningful opportunity to challenge the voluntariness of his resignation, he was not deprived of due process simply because he failed to avail himself of the opportunity.[1]

Because we hold that appellant was not deprived wrongfully of a hearing, we need not consider appellees'

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[1] It is possible that appellant now is precluded from instituting an Article 78 proceeding by the four-month limitation period contained in section 217 of N.Y. Civ. Prac. Law. *But see* N.Y. Civ. Prac. Law § 205; *Storch v. Gordon*, 37 Misc.2d 731, 733 (1962). However, so long as appellant had a reasonable time in which to seek Article 78 relief, he cannot make a legitimate claim of due process violation because his claim now may be barred. *See Ornstein v. Regan*, 604 F.2d 212, 214 (2d Cir. 1979).

alternate contention that, when a teacher's services are terminated because of the abolishment of his office or position, there is no requirement that a hearing be held. *See Mitchell v. Board of Educ.*, 40 N.Y.2d 904, 905 (1976); *Beers v. Nyquist*, 72 Misc.2d 210, 212 (1972)..

The judgment of the district court is affirmed.

CARDAMONE, *Circuit Judge*, dissenting:

For the sake of comprehensiveness, the facts of this case, as alleged in plaintiff Anthony Giglio's complaint, may be restated as follows. Plaintiff was employed by the Mt. Morris Central School District as a tenured high school principal. Beginning in April 1981, defendant John Dunn, Superintendent of the Mt. Morris School District, intentionally began to harass plaintiff and pressure him into a nervous breakdown. Plaintiff did suffer such a breakdown in November or December of 1981 and, as a result, commenced full time disability leave.

On June 28, 1982, while under intensive medical care and psychiatric treatment, plaintiff was informed by defendants Dunn and Charles Holowach, Superintendent of Schools for the Livingston-Steuben-Wyoming Board of Cooperative Educational Services, that his position as high school principal would be abolished immediately unless he agreed to return to work by July 1. When plaintiff replied that he could not return in three days, Dunn and Holowach then told plaintiff that unless he agreed to resign, his position would be abolished that evening. Later that day, and as a direct result of these threats, plaintiff tendered his letter of resignation. On information and belief, plaintiff asserts that the School

District's Board of Education never planned to abolish his position on June 28 and did not actually do so until September 8, 1982 when it created a new position of K-12 principal—a position in which more than 50 percent of the duties were previously performed by the high school principal.

Plaintiff claims, in effect, that defendants coerced him into resigning and that a coerced resignation is equivalent to being fired. Accordingly, he brought this action, pursuant to 42 U.S.C. § 1983, seeking damages (backpay), injunctive relief (reinstatement) and a declaratory judgment that his due process rights had been violated. The essence of the complaint is that plaintiff was forced from his tenured position, and thus deprived of a fundamental property right, without first having received notice and a hearing.

Upon defendants' motion, Judge Telesca dismissed the complaint for failure to state a claim upon which relief can be granted, Fed. R. Civ. P. 12(b)(6). He reasoned, in light of *Parratt v. Taylor*, 451 U.S. 527 (1981), that it would have been virtually impossible to give plaintiff a pre-deprivation hearing and that the post-deprivation remedy of an Article 78 proceeding would have satisfied the requisites of due process. For the reasons discussed below, I believe the decision of the district court was incorrect as a matter of law and, therefore, that this matter should be reversed and remanded for further proceedings.

I

The issue in this case is whether Giglio's complaint stated a claim under 42 U.S.C. § 1983 of deprivation of property without due process of law. Since dismissal

below was premised on Fed. R. Civ. P. 12(b)(6), all factual allegations in the complaint must be accepted as true. *Hospital Building Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 740 (1976). Moreover, dismissal should not have been granted "unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

To show a violation of 42 U.S.C. § 1983, a plaintiff must prove that the conduct complained of was committed by a person or persons acting under color of state law and that the conduct deprived plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States.[1] *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 (1970). There can be no doubt that the allegations in the complaint satisfy the first prerequisite to a Section 1983 action. The conduct complained of implicates two Superintendents in the Mt. Morris School District (Dunn and Holowach), five trustees of the School District and the School District itself. All of these defendants are state actors for purposes of Section 1983, and all acted under color of state law. *See Monroe v. Pape*, 365 U.S. 167 (1961). The second element was also met: Plaintiff's tenured position was a fundamental property right within the meaning of the Fourteenth Amendment, *see Perry v. Sindermann*, 408 U.S. 593, 601 (1972), and the alleged loss of this position amounted to a depriva-

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1 42 U.S.C. § 1983 (Supp. III 1979) provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

tion. The crucial inquiry, therefore, is whether that deprivation occurred without due process of law or, more specifically, whether plaintiff was entitled to a pre-deprivation hearing.

The district court and defendants rely heavily upon *Parratt v. Taylor*, 451 U.S. 527 (1981). In *Parratt*, the Supreme Court rejected the proposition that a state must, in all circumstances, provide a hearing prior to the initial deprivation of property. The Court observed that in most cases where due process requires a pre-deprivation hearing, the deprivation of property results from some established state procedure and "process" can be offered before any actual deprivation takes place. *Id.* at 537. *Parratt* involved the allegedly negligent mishandling of a prisoner's package by a prison guard. The prisoner sought to invoke Section 1983 by claiming that the post-deprivation remedy of a tort action against the guard in state court was insufficient and that due process mandated a pre-deprivation hearing. Reasoning that the loss of property resulted from a random and unauthorized act of a state employee and that the state (*i.e.*, presumably those officials in charge of instituting hearings) can hardly predict when such negligent acts will occur, the Court in *Parratt* ruled that it would have been virtually impossible to provide the prisoner with a meaningful pre-deprivation hearing. Thus, the touchstone in *Parratt* was the impracticability of holding a hearing prior to the claimed deprivation. *Id.* at 539-41. Once the Court found impracticability, its remaining task was to determine whether the post-deprivation remedy of a tort action provided the plaintiff with a meaningful opportunity to be heard. In fact, a tort action would have fully compensated the prisoner for his loss and it was therefore deemed sufficient. *Id.* at 543-44.

Defendants reason by analogy to *Parratt* that because their allegedly wrongful acts were wholly unpredictable, they could not have arranged for a pre-deprivation hearing as is required by N.Y. Educ. Law § 3020-a (McKinney 1981). Additionally, defendants contend that the New York State post-deprivation remedy of an Article 78 proceeding would adequately have protected plaintiff's due process rights. Neither assertion is persuasive.

II

First, the inquiry into whether it was practicable to arrange for a hearing prior to Giglio's allegedly coerced resignation presents a question of fact, not appropriate for disposition under Rule 12(b)(6). More importantly, there is strong reason to believe that a pre-deprivation hearing was viable. The complaint states that on June 28, 1982 two of the defendants approached plaintiff and threatened that the School District would abolish his position "*that evening*, unless he agreed to resign." (Emphasis supplied.) These allegedly intentional, not negligent, acts can hardly be called "unpredictable"; nor was it unpredictable that plaintiff responded by resigning several hours later. Since the acts were not unpredictable and a pre-deprivation hearing possible, the analogy to *Parratt* must fail. To hold otherwise would permit state actors such as defendants effectively to avoid due process requirements by intentionally coercing tenured employees into resigning, rather than by firing them outright.

The district court gave considerable weight to the phrase "established state procedure"—a phrase introduced by *Parratt* and echoed in several later opinions. *See, e.g., Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-36 (1982); *Kumar v. Marion County Common Pleas*

Court, 704 F.2d 908, 910 (6th Cir. 1983). The district court apparently concluded that a predeprivation hearing was not required because defendants' acts were not pursuant to an "established state procedure." This Court recently rejected a similar position in *Burtnieks v. City of New York*, 716 F.2d 982 (2d Cir. 1983), a case the majority fails to address. We said there that "decisions made by officials with final authority over significant matters, which contravene the requirements of a written municipal code, can constitute established state procedure." *Id.* at 988. In the present case, defendants include two Superintendents of the Mt. Morris School District, six Trustees of the Board of Education of that School District and the School District itself. Under New York State law these defendants are clothed with final authority over all matters pertinent to this case, including procedures related to hearings, ultimate termination of employees and abolition of existing positions. The district court ignored these facts and in doing so misconstrued *Parratt*. As noted, the crux of *Parratt* was the impracticability of providing any pre-deprivation process. To apply terms such as "established state procedure" out of context and without reference to the underlying policies erroneously exalts form over substance.

III

The second error committed by the district court and the majority of this panel is in finding that the post-deprivation remedy of an Article 78 proceeding provides adequate due process. In determining the timing and nature of the required hearing, courts must balance "the importance of the private interest and the length or finality of the deprivation; the likelihood of governmental error;

and the magnitude of the governmental interests involved." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 434 (1982) (citations omitted). Above all, it is clear that "the State may not *finally* destroy a property interest without first giving the putative owner an opportunity to present his claim of entitlement." *Id.* (Emphasis added.) Thus, in *Burtnieks v. City of New York*, *supra*, 716 F.2d at 987-89, a post-deprivation remedy in tort was held inadequate where the City demolished plaintiff's building without first considering the merits of her claims.

Applying the *Logan* factors to this case, a post-deprivation Article 78 proceeding would not come close to affording plaintiff the safeguards of a pre-deprivation hearing. The importance of plaintiff's interest in his livelihood is unarguably great. Also, the deprivation here is essentially final since the position of high school principal has been abolished. With respect to finality, the position could, of course, be recreated. Yet, so could Mrs. Burtnieks' building. No doubt the State has a substantial interest in assuring that its high school principals are mentally and emotionally fit; nevertheless, it is hard to discern how that interest would have been compromised by granting plaintiff a pre-deprivation hearing.

Thus, not only was a pre-deprivation hearing viable, but, in addition, a post-deprivation remedy would not have provided plaintiff with a meaningful opportunity to be heard. An affirmance, therefore, would require this Court to hold as a matter of law that a "forced resignation" could never constitute a "discharge." Such a holding would contradict both common sense and the decisions of several courts that have passed on this question in different contexts. *See, e.g., Dabney v. Freemen*, 358 F.2d 533, 535 (D.C. Cir. 1965) (a separation from federal service by means of a coerced resignation is,

in substance, a discharge); *Paroczay v. Hodges*, 219 F. Supp. 89, 94 (D.D.C. 1963) (involuntary resignation from government employment constitutes a discharge where employee is forced to make immediate choice between resigning and facing charges); *Willis v. VonHolden*, 67 A.D.2d 810 (4th Dept. 1979). If Giglio had signed the letter of resignation while defendants held a gun to his head, few would argue that the resignation was not coerced or that it differed in substance from a simple termination. While here there was no gun, that is not to say there was no coercion. The complaint plainly alleges coercion, and the district court might well find such coercion where a high school principal, undergoing psychiatric treatment, resigns under threat of a humiliating public discharge. Again, this is a question of fact and, accepting as true the allegations in Giglio's complaint, this Court should find that plaintiff stated a claim upon which relief can be granted.

IV

Defendants argue that N.Y. Educ. Law § 3020-a ordinarily guarantees due process, that plaintiff alleges a violation of this state law and thus that Giglio's remedy is an Article 78 proceeding. While this view is correct as far as it goes, it tells only half of the story. It is true that defendants violate state law when they disregard Section 3020-a, and plaintiff may seek vindication of these state law rights in a timely instituted Article 78 proceeding. But Giglio alleges more than a claim under state law. He also alleges a federal constitutional claim for deprivation of property without due process. This federal claim has a corresponding federal remedy—42 U.S.C. § 1983. In other words, Article 78 and Section 1983 are, for Giglio's

purposes, alternative or parallel remedies, both of which he is entitled to claim. And it is well settled that a plaintiff need not exhaust the former before pursuing the latter. *Monroe v. Pape*, 365 U.S. 167, 183 (1961).

Accordingly, for all the reasons set forth above I respectfully dissent.

Appendix B

Order of the United States Court of Appeals denying rehearing filed May 31, 1984

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT,

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 31st day of May one thousand nine hundred and eighty-four.

ANTHONY F. GIGLIO,

Plaintiff-Appellant,

v.

JOHN P. DUNN, Individually and as Superintendent of Schools of Mt. Morris Central School District, CHARLES HOLLOWACH, Individually and as Superintendent of Mt. Morris Central School District, ROBERT BISHOP, Individually and as Trustee, GLENN DALRYMPLE, Individually and as Trustee, RONALD HALLINEN, Individually and as Trustee, MICHAEL MACARTHUR, Individually and as Trustee, ANN CROWLEY, Individually and as Trustee, BEATRICE PALERMO, Individually and as Trustee, and MT. MORRIS CENTRAL SCHOOL DISTRICT,

Defendants-Appellees.

No. 83-7871

A petition for rehearing containing a suggestion that the action be reheard in banc having filed herein by counsel for the plaintiff-appellant, Anthony F. Giglio,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED, Judge Cardamone dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

United States Court of Appeals
Filed May 31, 1984
Elaine B. Goldsmith
Second Circuit

Appendix C

Decision of the United States District Court dated September 15, 1983

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF NEW YORK.

ANTHONY F. GIGLIO,

Plaintiff,

v.

JOHN P. DUNN, Individually and as Superintendent of Schools of Mt. Morris Central School District, CHARLES HOLLOWACH, Individually and as Superintendent of Mt. Morris Central School District, ROBERT BISHOP, Individually and as Trustee, GLENN DALRYMPLE, Individually and as Trustee, RONALD HALLINEN, Individually and as Trustee, MICHAEL MACARTHUR, Individually and as Trustee, ANN CROWLEY, Individually and as Trustee, BEATRICE PALERMO, Individually and as Trustee, and MT. MORRIS CENTRAL SCHOOL DISTRICT,

Defendants.

CIV-83-601T

The instant action is one commenced pursuant to 42 U.S.C. Section 1983. Plaintiff alleges that defendants,

(two superintendents and six trustees of the Mt. Morris Central School District, and the School District), conspired together to deprive plaintiff of his tenured school principal position without due process of law. Defendants now move pursuant to F. R. Civ. P. 12 to dismiss the complaint, or in the alternative, to strike certain portions thereof.

FACTS

The facts alleged in the complaint are as follows. Plaintiff, prior to the events leading up to his resignation, was a tenured high school principal for seven years having been employed by the Mt. Morris Central School District for a total of 22 years. In 1981, as a result of alleged harrassment by defendants, plaintiff suffered a nervous breakdown which led him to full time disability leave in December of 1981. In June of 1982, plaintiff alleges that defendants Dunn and Hollowach, acting at the direction of other defendants, wrongfully coerced him into resigning his position as a school principal. Thereafter plaintiff asked to withdraw his resignation, but was not permitted to do so. The defendants then abolished the position and created a new position which plaintiff claims involves substantially the same duties and responsibilities as the position from which he resigned. Simply stated, the plaintiff claims that they (the defendants) abolished his "principal" position and created another position, with a different name, but with essentially the same responsibilities. He therefore claims that he has been deprived of both substantive and procedural due process. Defendants move to dismiss the complaint for failure to state a claim.

DISCUSSION

At the outset, the nature of plaintiff's alleged property interest needs to be examined. Under the New York Education Law, Section 2509, administrators, directors, supervisors and principals of a school district are appointed by the Board of Education for a three year probationary period. A person so appointed may be terminated at any time prior to the expiration of the probationary period by simple majority vote of the Board. After the three year period, an employee holding such a position cannot be terminated except for cause. Section 2509(2). Section 3020-a of the Education Law provides an elaborate system for the filing of charges against a tenured employee and for a hearing on those charges. A companion provision, Section 2510, prohibits the bad faith abolition of a tenured employee's position and mandates that where a position is abolished which was held by a tenured employee, and a new similar position is created, the tenured employee must be appointed to that new position. *See Weimer v. Board of Education,* 74 AD 2d 574 (2nd Dept. 1980).

I.

Plaintiff claims that he was wrongfully coerced into resigning his tenured position and that his position was subsequently abolished in bad faith thereby depriving him of both his substantive and procedural due process rights as guaranteed by the Fourteenth Amendment of the United States Constitution. It has been held that a tenured public employee possesses a valid and protectable property interest in that employment. *See Perry v. Cindermann,* 408 U.S. 593, 601 (1972). Yet, an individual's property interest in such employment is not created by the Constitution. *Board of Regents v. Roth,* 408 U.S. 564 (1972).

"Rather, [such property interests] are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Id.* at 577. It is only when state legislation or governmental action is challenged as abridging a fundamental constitutional right has it been held that an individual's substantive due process rights are violated. *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *Rowe v. Wade*, 410 U.S. 1113 (1973).

Plaintiff's complaint alleges only that he was deprived of his property interest in continued public employment but does not allege a deprivation of a fundamental constitutional right. Thus, no substantive due process claim has been stated.

II.

However, with reference to plaintiff's procedural due process claim, it is virtually undisputed that defendants acted under color of state law, *Monroe v. Pape*, 365 U.S. 167 (1961); that plaintiff's tenured position is indeed "property" within the meaning of the Fourteenth Amendment, *Perry v. Cindermann, supra*; and, that the alleged loss would be a deprivation. Defendants argue, however, that even if the plaintiff's allegations are taken as true, he has not been denied procedural due process. In support of this proposition, defendants rely upon *Parratt v. Taylor*, 451 U.S. 527 (1981).

In *Parratt* the Supreme Court held that the negligent loss of a prisoner's property by a prison official was not a due process violation when the state provided an adequate post-deprivation remedy. The courts since *Parratt* have expanded its scope beyond mere negligent deprivations of property. As stated in *Palmer v. Hudson*, 697 F.2d 1220, 1222 (4th Cir. 1983):

> [I]f the underlying principle is, as Justice Rehnquist stated in the plurality opinion, that when no practical way to provide a pre-deprivation hearing exists, a post-deprivation hearing will satisfy the dictates of procedural due process, then it as well applies to an intentional deprivation for which meaningful prior review was impractical. *Accord Engblom v. Carey*, 677 F.2d 957 (2nd Cir. 1972); *Rutledge v. Arizona Board of Regents*, 660 F.2d 1345, 1352 (9th Cir. 1981), *cert. granted, sub nom Kush v. + Rutledge*, 102 S.Ct. 3508, 73 L. Ed. 2d 1382 (1982).

Both parties concede that New York's statutory procedure, New York Education Law Section 3020-a, which provides for notice and a hearing prior to the discharge of a tenured employee, is sufficient to guarantee procedural due process. The issue here is whether the circumvention of such adequate procedures by state officials to deprive plaintiff of his tenure rights, is itself susceptible to a pre-deprivation hearing prior to the commission of the intentional act. Defendants' contend that it would be impossible to predict when such random acts are about to occur, and therefore, impossible to provide a pre-deprivation remedy. Thus, defendants' argue, New York's post-deprivation remedy, a proceeding pursuant to New York Civil Practice Law and Rules Article 78 is adequate to provide plaintiff with due process of law.[1] I agree.

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[1]The New York Article 78 proceeding supersedes the common law writs of certiorari to review, mandamus and prohibition. It provides a uniform device for challenging or reviewing administrative or other types of governmental action in New York State Supreme Court. See David D. Siegel, *New York Practice*, (1978) Section 557 *et seq.*

In *Kumar v. Marion County Common Pleas Court,* 704 F.2d 908 (6th Cir. 1983) the plaintiff brought a Section 1983 action against various officials of the Ohio Matrimonial Court system alleging that their misconduct during his divorce proceeding and appeals therefrom, denied him due process of law. In dismissing the plaintiff's claim the court noted:

> [A]ssuming *arguendo* a constitutional claim on Kumar's part, we nevertheless find that his rights are adequately protected by state law. *See Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981). Like *Parratt,* this case is not one where plaintiff alleges a deprivation as a result of established state procedure. Rather, Kumar's injury, if it exists, is the result of the unauthorized failure of certain state agents to follow established state law.

Id. at 910.

In *Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982), a case decided after *Parratt,* an employee who brought a charge of discrimination against his employer was denied a ruling on the merits due to a procedural failure of the Illinois Fair Employment Practice Commission to timely convene a fact-finding conference within the statutory period. In distinguishing *Parratt* the court stated:

> In *Parratt,* the Court emphasized that it was dealing with 'a tortuous loss of . . . property as a result of a random and unauthorized act by a state employee . . . not a result of some established state procedure.' 451 U.S. at 541. Here, in contrast, it is the state system itself that destroys a complainant's

> property interest, by operation of law, whenever the commission fails to convene a timely conference—whether the commission's action is taken through negligence, maliciousness, or otherwise. *Parratt* was not designed to reach such a situation. *See Id.* at 545 (2nd concurring opinion). Unlike the complainant in *Parratt*, Logan is challenging not the commission's error, but the "established state procedure" that destroys his entitlement without according him proper procedural safeguards.

Id. at 435-436.

Just as in *Parratt,* the alleged acts of defendants here were "not the result of some established state procedure." *Id.* Further, the facts presented describe a situation where any meaningful pre-deprivation process would be not only impractical, but virtually impossible, considering that it is the circumvention of an established procedure, and not the procedure itself, which is being challenged. Thus, all that remains is to examine the adequacy of New York's post-deprivation remedy. *See Burtnicks v. City of New York,* No. 82-7733 (2nd Cir. August 26, 1983) slip op. at 6075.

It is noted, that the state post-deprivation remedy, (a proceeding pursuant to Article 78 of the New York C.P.L.R.), may not provide all of the possible relief available to a plaintiff in a civil rights action. However, even though ". . . the remedy may not be all that [plaintiff] may have hoped for under Section 1983 'does not mean that the state remed[y] [is] not adequate to satisfy the requisites of due process' *Id.* at 554" *Kumar v. Marion City Common Pleas Court,* 704 F.2d at 910 (citing *Parratt v. Taylor*). I hold that New York's post-deprivation remedy pursuant to Article 78 C.P.L.R. offered plaintiff the opportunity to be heard "at a meaningful time and in a

meaningful manner" under the circumstances of this case. *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). The due process clause requires no more.

Plaintiff's complaint is dismissed.

So ordered.

MICHAEL A. TELESCA
United States District Judge

Dated: Rochester, New York
September 15, 1983.

Appendix D

Constitution, Acts and Statutes

CONSTITUTION

of the

UNITED STATES OF AMERICA

AMENDMENT 14

Section 1. Citizens of the United States.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 § 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

R.S. § 1979; Pub.L. 96–170, § 1, Dec. 29, 1979, 93 Stat. 1284.

NEW YORK

EDUCATION LAW

§ 2509. Appointment of assistant and other superintendents, teachers and other employees

1. (b) Administrators, directors, supervisors, principals and all other members of the supervising staff, except associate, assistant and other superintendents, authorized by section twenty-five hundred three of this article, shall be appointed by the board of education, upon the recommendation of the superintendent of schools for a probationary period of three years. The service of a person appointed to any of such positions may be discontinued at any time during the probationary period on the recommendation of the superintendent of schools, by a majority vote of the board of education.

2. At the expiration of the probationary term of any persons appointed for such term, or within six months prior thereto, the superintendent of schools shall make a written report to the board of education recommending for appointment on tenure those persons who have been found competent, efficient and satisfactory. By a majority vote the board of education may then appoint on tenure any or all of the persons recommended by the superintendent of schools. Such persons and all others employed in the teaching service of the schools of such school district who have served the full probationary period shall hold their respective positions during good behavior and efficient and competent service, and shall not be removable except for cause after a hearing as provided by section three thousand twenty-a of such law. Failure to maintain certification as required by this chapter and the regulations of the commissioner of education shall constitute cause for removal.

§ 2510. Abolition of office or position

1. If the board of education abolishes an office or position and creates another office or position for the performance of duties similar to those performed in the office or position abolished, the person filling such office or position at the time of its abolishment shall be appointed to the office or position thus created without reduction in salary or increment, provided the record of such person has been one of faithful, competent service in the office or position he has filled.

2. Whenever a board of education abolishes a position under this chapter, the services of the teacher having the least seniority in the system within the tenure of the position abolished shall be discontinued.

3. If an office or position is abolished or if it is consolidated with another position without creating a new position, the person filling such position at the time of its abolishment or consolidation shall be placed upon a preferred eligible list of candidates for appointment to a vacancy that then exists or that may thereafter occur in an office or position similar to the one which such person filled without reduction in salary or increment, provided the record of such person has been one of faithful, competent service in the office or position he has filled. The persons on such preferred list shall be reinstated or appointed to such vacancies in such corresponding or similar positions in the order of their length of service in the system at any time within seven years from the date of abolition or consolidation of such office or position.

§ 3020-a. Hearing procedures and penalties

1. Filing of charges. All charges against a person enjoying the benefits of tenure as provided in subdivision three of section one thousand one hundred two, and sections two thousand five hundred nine, two thousand five hundred seventy-three, twenty-five hundred ninety-j, three thousand twelve, three thousand thirteen and three thousand fourteen of this law shall be in writing and filed with the clerk or secretary of the school district or employing board during the period between the actual opening and closing of the school year for which the employee is normally required to serve. Except as provided in subdivision eight of section two thousand five hundred seventy-three and subdivision seven of section twenty-five hundred ninety-j of this law, no charges under this section shall be brought more than three years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed.

2. Disposition of charges. Upon receipt of the charges, the clerk or secretary of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists. If such determination is affirmative, a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certified mail. The employee may be suspended pending a hearing on the charges and the final determination thereof. Within ten days of receipt of the statement of charges, the employee shall notify the clerk or secretary of the employing board whether he desires a hearing on the charges. The inexcused failure of the employee to notify the clerk or secretary of his desire for a hearing within ten days of the receipt of charges shall be deemed a waiver of the right to a hearing. Unless the employee has waived his right to a hearing within the allotted time, the clerk or secretary of the board shall, not later than the end of said ten-day period, notify the commissioner of education of the need for a hearing. If the employee waives his right to a hearing the employing board shall proceed, within fifteen days, by a vote of a majority

of all the members of such board, to determine the case and fix the penalty or punishment, if any, to be imposed in accordance with subdivision four of this section.

3. Hearings.

a. Notice of hearing. Upon receipt of a request for a hearing in accordance with subdivision two of this section, the commissioner of education shall schedule a hearing, to be held in the local school district, or county seat, within twenty working days of his receipt of the request therefor, and immediately notify the employee and the employing board of the time and place thereof and the procedures to be followed in selecting a hearing panel.

b. Hearing panel members. For the purposes of this section the commissioner of education shall maintain a list of hearing panel members, composed of professional personnel without administrative or supervisory responsibility, professional personnel with administrative or supervisory responsibility, chief school administrators, members of employing boards and others, selected from lists of nominees submitted by statewide organizations representing teachers, school administrators and supervisors and the employing boards. Hearing panel members except the chairman of the panel shall be compensated at the rate of fifty dollars for each day of actual service plus necessary travel and subsistence expenses incurred in carrying out the duties of a panel member. The chairman of the panel shall be paid the normal and customary fee paid to him for services as an arbiter under the auspices of the American Arbitration Association.

c. Hearing procedures. The commissioner of education shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence. All such hearings shall be held before a hearing panel composed of three members not resident, nor employed, in the territory under the jurisdiction of the employing board, selected in the following manner from the list maintained by the commissioner of education for such purpose and from a list supplied by the American Arbitration Association: one member shall be selected by the employee, and one member shall be selected by the employing

board from the list maintained by the commissioner, and the third member shall be chosen by mutual agreement of the first two, or, if they fail to agree, by the commissioner of education, from the list supplied by the American Arbitration Association. Such third member shall be chairman of the panel.

Each such hearing shall be conducted by the chairman of the panel and shall be public or private at the discretion of the employee. The employee shall have a reasonable opportunity to defend himself and an opportunity to testify in his own behalf. Each party shall have the right to be represented by counsel, to subpoena witnesses, and to cross-examine witnesses. All testimony taken shall be under oath which the chairman of the panel is hereby authorized to administer. A competent stenographer, designated by the commissioner of education, shall keep and transcribe a record of the proceedings at each such hearing. A copy of the transcript of the hearing shall, upon request, be furnished without charge to the employee and the board of education involved.

4. Post hearing procedures. Within five days of the conclusion of a hearing held under this section, the commissioner of education shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to penalty or punishment if one is warranted, to the employee and to the clerk or secretary of the employing board. Within thirty days of receipt of such hearing report the employing board shall implement the recommendations thereof, which shall include the penalty or punishment, if any, of a reprimand, a fine, suspension for a fixed time without pay or dismissal. If the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record.

5. Appeal. Either the employee or the employing board may review the findings of the hearing panel either by appeal to the commissioner of education as provided for by article seven of this chapter, or by a special proceeding under article seventy-eight of the civil practice law and rules. The hearing panel's determination shall be deemed to be final for the purpose of such proceeding.

6. Notwithstanding any other provision of law to the contrary, a hearing panel member who is employed by a public school district or board of cooperative educational services shall be released from duty by such district or board for such period necessary to carry out the responsibilities of such panel member. Nothing contained in this subdivision shall be construed to diminish or impair any benefits to which such hearing panel member or his legal representative or beneficiaries would be otherwise entitled had such panel member not been released from duty in accordance with the provisions of this subdivision, provided, however, that such district or board may require such panel member to reimburse such district or board an amount equal to the daily compensation otherwise payable pursuant to this section.

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No. 84-314

In The

Supreme Court of the United States

October Term, 1984

ANTHONY F. GIGLIO,

Petitioner,

vs.

JOHN P. DUNN, Individually, and as Superintendent of Schools of Mt. Morris Central School District, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF RESPONDENT IN OPPOSITION

Paul R. Braunsdorf,
Counsel of Record
HARRIS, BEACH, WILCOX, RUBIN and LEVEY
Office and Post Office Address
Two State Street
Rochester, New York 14614
Telephone: (716) 232-4440
Counsel for Respondents

James A. Spitz, Jr.
Angela J. Panzarella
Of Counsel

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(10984)

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment of the United States Constitution requires the State of New York to provide a hearing prior to an employee's allegedly coerced resignation where the State made available to the employee an adequate postdeprivation procedure for contesting that resignation.

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

Respondents respectfully request that this Court deny the petition for a writ of certiorari in this case.

STATEMENT OF THE CASE

Petitioner commenced this action in United States District Court for the Western District of New York pursuant to 42 U.S.C. §1983. Petitioner alleged in his complaint that he resigned from his position as a tenured high school principal in the Mount Morris Central School District. Petitioner further alleged that his resignation was coerced and claimed that he was denied due process of law because a hearing did not precede the alleged coerced resignation.

On July 13, 1983, the district court granted respondent's motion for an order pursuant to Rule 12(b) or the Federal Rules of Civil Proceeding to dismiss the complaint for failure to state a claim upon which relief can be granted.

The Court of Appeals for the Second Circuit affirmed the decision of the district court. *Giglio v. Dunn*, 732 F.2d 1133 (2d Cir. 1984). Relying on *Parratt v. Taylor*, 451 U.S. 527 (1981), the Court of Appeals held that it would have been impracticable for the State of New York to provide petitioner a meaningful pre-resignation hearing. It further found that the petitioner had available to him adequate postdeprivation procedures under New York law. According, it agreed with the lower court's view that petitioner's complaint failed to state a claim under 42 U.S.C. §1983.

Giglio subsequently petitioned for a rehearing and a rehearing en banc. The petition was denied.

REASONS FOR DENYING WRIT

I. THE DECISION OF THE COURT OF APPEALS WAS ENTIRELY CONSISTENT WITH THE DECISIONS OF THIS COURT.

The Court of Appeals for the Second Circuit faithfully applied the decisions of this Court in coming to its decision in this case. The Court of Appeals relied for its decision on this Court's holding in *Parratt v. Taylor*, 451 U.S. 527 (1981), in which this Court held that adequate postdeprivation remedies satisfy the requisites of procedural due process where it is impracticable for the State to provide a meaningful predeprivation hearing.

The Court of Appeals properly applied this Court's analysis in *Parratt* and concluded that it was impracticable for the State of New York to provide the petitioner a hearing before he resigned. The court reasoned that the concept of a predeprivation hearing simply has no meaning in the context of an allegedly coerced resignation. As the Court of Appeals pointed out, it is difficult to envision what sort of hearing or process the State of New York could have afforded the petitioner before he resigned or what issues could have been litigated. In a case such as this, where the loss of employment was not a unilateral act on the part of the

employer nor purports to be for cause, "the only possible dispute is whether the resignation was voluntary or involuntary, and this cannot be determined in advance." *Giglio v. Dunn,* 732 F.2d 1133, 1135 (2d Cir. 1984).

This Court's recent decision in *Hudson v. Palmer,* 52 U.S.L.W. 5052 (U.S. July 3, 1984), contrary to petitioner's suggestion, demonstrates that the Court of Appeals' application of *Parratt* to this case was entirely proper. In *Hudson v. Palmer,* this Court extended the holding of *Parratt v. Taylor* to unauthorized, intentional deprivations of property as follows:

> The underlying rationale of *Parratt* is that when deprivations of property are effected through random and unauthorized conduct of a state employee, predeprivation procedures are simply "impracticable" since the state cannot know when such deprivations will occur . . . . The State can no more anticipate and control in advance the random and unauthorized intentional conduct of its employees than it can anticipate similar negligent conduct.

Id. at 5056. The Court of Appeals correctly held that the alleged intentional coercion of petitioner and his subsequent resignation could not have been anticipated and controlled in advance by the State.

Petitioner still argues that a predeprivation hearing was practicable because the respondents' intentionally coercive conduct was predictable by them, and they could have thus afforded the petitioner a hearing before he succumbed and submitted his resignation. This argument was rejected by the Court in *Hudson v. Palmer,* where the Court pointed out that an individual official's ability to foresee and control the deprivation is not relevant to the issue of whether the *State* can provide predeprivation process. 52 U.S.L.W. at 5056. Here, as in *Hudson,* the State is powerless to anticipate when officials will commit random and unauthorized coercive acts and intercede with process. In a case such as this, "the State's action is not complete until and unless it provides or refuses to provide a suitable postdeprivation remedy." *Id.*

Petitioner's contention that the Court of Appeals erred in failing to apply the decision in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), is also without merit. In *Logan,* this Court held that a postdeprivation state remedy does not satisfy due process where the property deprivation is effected pursuant to an established state procedure. Petitioner's argument that established state procedure was involved in this case is, upon closer examination, simply a variation of the argument rejected in *Hudson v. Palmer,* discussed above.

Pared to its essentials, petitioner's claim is that because the respondents were the "sole state actors" who could provide him a hearing before he resigned, their conduct (or misconduct) constituted established state procedure. Under petitioner's analysis, any property loss resulting from intentional misconduct on the part of a state official would constitute established state procedure because that official would be the sole actor in a position to decide if process will be afforded before the misconduct and resulting loss occurs. This is precisely the argument rejected by the Court in *Hudson v. Palmer, supra.*

Petitioner's argument also overlooks the fact that his property loss occurred when he resigned, allegedly as a result of harassment. As the Court of Appeals pointed out, a resignation, even one that is allegedly involuntary, is fundamentally different from a termination for cause. New York has provided pretermination procedures in the latter situation. See N.Y. Educ. Law §3020-a (McKinney). In contrast, no procedure exists or could exist for intercession by the State before an employee resigns.

As the Court of Appeals determined, the petitioner had available to him a meaningful opportunity to be heard and to redress his claim through a proceeding pursuant to Article 78 of the New

York Civil Practice Law and Rules.[1] Had petitioner availed himself of this procedure, he could have contested the voluntariness of his resignation and, if successful, been awarded reinstatement and back pay. *See. e.g., Cacchioli v. Hoberman,* 31 N.Y.2d 287, 291 N.E.2d 117 (1982). It is evident here that the State provided an adequate postdeprivation remedy for the alleged loss of petitioner's employment.

In sum, the Court of Appeals determined that here, where the State cannot provide a meaningful hearing before the loss occurs, the availability of an Article 78 proceeding satisfied the requisites of due process. The respondents respectfully submit that the Court of Appeals' decision in this case is in all respects consistent with the precedents established by this Court. This case presents, at best, a variation on the fact patterns already reviewed by the Court and does not merit the Court's attention.

II. PETITIONER HAS NOT DEMONSTRATED THAT A CONFLICT EXISTS AMONG THE CIRCUIT COURTS OF APPEALS.

Petitioner's argument that this case is representative of an unresolved conflict among the circuits is meritless. The cases cited by the petitioner as representing a view contrary to that expressed in the Court of Appeals in this case do not involve facts or issues comparable to those presented here.

Representative of one view, according to the petitioner, is *Cohen v. City of Philadelphia,* 736 F.2d 81 (3rd Cir. 1984), a case involving the unauthorized failure of a civil service commission to follow state procedures for the conduct of post-termination hearings. Petitioner incorrectly states that the officials in *Cohen* failed to comply with municipal procedures providing for a pre-

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[1] An Article 78 proceeding is a uniform procedure for challenging or reviewing the action of government officials that supercedes in New York the common law writs of certiorari to review, mandamus and prohibition. D. Seigel, *New York Practice* §557 *et seq.* (1978).

termination hearing; the procedures in question provided solely for post-termination relief. The Court of Appeals expressly found these procedures constitutionally adequate, relying upon this Court's decision in *Arnett v. Kennedy,* 416 U.S. 134, (1974) (736 F.2d, 84 n.6), but found that errors had been made by the commission in the course of applying these procedures. It held, however, that the state procedures available to the plaintiff for review of the commission's decision afforded him all the process the constitution requires. *Cohen* is at least arguably similar to the case at hand in that there, too, the Court of Appeals extended the *Parratt v. Taylor* rationale to intentional acts of state officials. As discussed above, however, any controversy regarding the propriety of this view has now been resolved by the Court's decision in *Hudson v. Palmer, supra.*

As allegedly representing a contrary view, petitioner cites two cases, *Loudermill v. Cleveland Board of Education,* 721 F.2d 550 (6th Cir. 1983), *cert. granted,* 52 U.S.L.W. 3844 (U.S. July 21, 1984) (Nos. 83-1362, 83-6392), and *Vail v. Board of Education,* 706 F.2d 1435 (7th Cir. 1983) *aff'd by equally divided court,* 52 U.S.L.W. 4483 (U.S. April 23, 1984). In *Loudermill,* the Court of Appeals for the Sixth Circuit held that the State of Ohio's established procedure for terminating employees for cause was constitutionally inadequate in that it afforded employees only a post-termination hearing [citing, *inter alia, Arnett v. Kennedy,* 416 U.S. 134 (1974), and *Mathews v. Eldridge,* 424 U.S. 319, 333-35 (1976)]. In the second case cited by petitioner, *Vail v. Board of Education,* the court held that an implied contract for employment created a constitutionally protected property interest which could not be terminated for cause without a prior hearing. That court found *Parratt v. Taylor* inapplicable because, unlike *Parratt,* the case did not involve officials' disregard of established state policy.

Neither *Loudermill* nor *Vail* involved deprivations of property resulting from unauthorized misconduct, as allegedly occurred

in this case, and thus did not involve the issue of whether pre-deprivation process was practicable or meaningful. Inasmuch as this case is not comparable to these two cases, it is not representative of a conflict and need not be reviewed on that basis.

III. THERE IS NO INTRACIRCUIT CONFLICT.

The Court of Appeals' failure to address whether Petitioner's loss occurred pursuant to established state procedure does not demonstrate an intracircuit conflict.

In arguing to the contrary, petitioner places undue importance on a comment regarding "established state procedure" made by Judge Pierce in *Burtnieks v. City of New York,* 716 F.2d 982, 988 (2d Cir. 1983); a fair reading of that case reveals that the comment was dictum. The applicability of *Burtnieks* and the issue of established state procedure was fully briefed by petitioner to the Court of Appeals. Quite obviously, the majority of that court did not feel constrained to address these points in its decision because it found them to have no application here.[2] As discussed above, the validity of that view has been demonstrated by this Court's decision in *Hudson v. Palmer, supra.* Rather than create an intracircuit conflict, it should be plain that the Court of Appeals' failure to address the comment in *Burtnieks* served to clarify the import of a rather ambiguous statement.

This Court has no need to review this case in order to hunt for an intracircuit conflict where one plainly does not exist. For this reason, the Petition should be denied.

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[2] It is significant that Judge Van Graafeiland, who authored the Court of Appeals' decision in this case, was also on the panel that heard *Burtnieks.* Moreover, not one of the members of the Court of Appeals for the Second Circuit requested a vote on Giglio's petition for a rehearing en banc, with the exception of Judge Cardamone, who dissented from the court's original decision in this case. It would seem, therefore, that the members of the circuit do not perceive a conflict in their expressed views on this point.

IV. THIS CASE PRESENTS NO SPECIAL OR IMPORTANT ISSUES REQUIRING THIS COURT'S ATTENTION.

Petitioner contends that the decision of the court below will somehow be perceived as condoning coercive actions by State officials designed to pressure their employees to submit their resignations. The suggestion that the decision will result in an outbreak of coerced resignations is absurd.

The Court of Appeals did not hold that State officials may coerce resignation with impunity; State officials have always been subject to corrective action for their misconduct in the course of an Article 78 proceeding. The Court of Appeals simply concluded that, due to the nature of the property deprivation in this case and the official action which allegedly brought about that deprivation, the State could not have provided a meaningful hearing until after the petitioner resigned. By making a meaningful hearing available to him at the only time feasible, the court held, New York afforded the petitioner all the process the constitution requires.

Petitioner's contention that the decision permits officials to "avoid due process requirements" simply begs the question. He has not demonstrated that this case will have any significant effect upon persons other than the parties to this case or that the circumstances herein are particularly likely to re-occur. Accordingly, it does not merit review by this Court.

CONCLUSION

For the foregoing reasons, respondents respectfully submit that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

HARRIS, BEACH, WILCOX,
RUBIN AND LEVEY
By: Paul R. Braunsdorf
Counsel of Record
Attorneys for Respondents
Two State Street
Rochester, New York 14614
Telephone: (716) 232-4440

James A. Spitz, Jr.
Angela J. Panzarella
Of Counsel